

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-381(RJD)

Plaintiff, : *[Redacted]*

-against- : Brooklyn, New York

VITALY KORCHEVSKY and :
VLADISLAV KHALUPSKY, May 31, 2018
2:30 p.m.

Defendants. : 2188 p.m.

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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
SENIOR UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 THE CLERK: We are on this afternoon for a status
2 conference. This is USA versus Vitaly Korchevsky and USA
3 versus --

4 You are going to have to help me with the
5 pronunciation of your first name.

6 DEFENDANT KHALUPSKY: Vladislav.

7 THE CLERK: -- Khalupsky. Thank you. 15-CRIM-381.
8 We're on Superseder 1.

9 Can I ask the attorneys please to note their
10 appearance beginning with counsel for government.

11 MR. TUCKER: Good afternoon, Your Honor. Rich
12 Tucker, Julia Nestor and David Gopstein for the United States.

13 MS. NESTOR: Good afternoon, Your Honor.

14 MR. GOPSTEIN: Good afternoon.

15 THE COURT: Good Afternoon.

16 MR. BRILL: Judge, good afternoon. Sullivan & Brill
17 by Steven Brill and James Healy for Vitaly Korchevsky. How
18 are you.

19 MR. HEALY: Good afternoon.

20 THE COURT: Good afternoon.

21 MS. WHALEN: Good afternoon, Your Honor. The
22 Federal Defenders of New York by Mildred Whalen and LaKeytria
23 Felder for Mr. Khalupsky and we have the Russian interpreter
24 joining us on standby.

25 THE COURT: Thank you so much. Welcome all.

1 I hardly know where to begin. Actually, I do know
2 where to begin. I was a little put out, frankly, by the
3 complaints that I did not entertain the request for a
4 questionnaire, a request I would have readily granted had it
5 been made in a more timely fashion because I am sure you all
6 as experienced lawyers know the use of questionnaires requires
7 a separate dedicated panel and there just was not sufficient
8 time to do what has to be done by the jury people. We asked
9 them many times to arrange that. So that was the only reason
10 why a questionnaire was not viable.

11 That said, I have ordered at least a double panel so
12 we are not going to hopefully have a false start at it. Right
13 now, I am hoping to be able to select the jury myself. That
14 said, we would like probably at least begin the process,
15 because with the size of the panel, we will not be able to fit
16 here, in the ceremonial courtroom. At some point, we will at
17 least reduce the number of prospective jurors to a point where
18 we can, at a break, conveniently reunite here.

19 I will expand my usual inquiry of the jurors, the
20 voir dire, to cover many of the subjects that seem to be of
21 concern to the defense as are reflected in a letter, I
22 believe, Ms. Whalen, you sent to me. I have so many letters
23 and so many submissions that it is hard to keep them all
24 separated, but I have at least one letter reflecting a request
25 for specific areas of inquiry and for the most part, I will

1 get into that with the prospective jurors.

2 I can tell you that we will not open day one. We
3 will open the morning of day two so that you can plan
4 accordingly. If I am unable to select the jury myself, rest
5 assured I have Judge Reyes standing by and he will be duly
6 instructed to cover the areas that I am comfortable addressing
7 during the examination of prospective jurors.

8 You know this is very helpful to me. I do not mean
9 to suggest otherwise. But as you know, some of these calls
10 are discretionary of an evidentiary nature and as much as I
11 would like to give you a bright line today, I am not going to
12 do that. I do not think it would be responsible for me to do
13 that. I will identify, as we go through these, the areas
14 where I have some concerns and give you my thinking on it and,
15 to some extent, give you a flat out ruling on it.

16 One side is worried about the case getting into the,
17 I hate to use the terminology that has become lately popular
18 lately, but the dark area of internet hacking and Russians and
19 all of that business and so forth and so on. That is not
20 going to happen. The allegation is here that certain people
21 were able to access these computers, they happened to be
22 Russian and that is probably about as far as it is going to
23 go. On the other side, the government is concerned that we're
24 going to have "This is your life" for Mr. Korchevsky and we
25 are going to recite, ad nauseam -- I shouldn't say "ad

1 nauseam" -- at great length Mr. Korchevsky's virtues, so forth
2 and so on. That is not going to happen either. On the other
3 hand, his character may very well be put in issue. If he
4 chooses to testify, certainly his credibility is an issue.

5 So, these are two areas where I know you are
6 battling back and forth. I cannot say anything more about it
7 today other than I think I am sensitive to the concerns that
8 the defense has raised and I am certainly going to keep the
9 government on the short leash when it comes to some of these
10 other areas.

11 That is my opening statement. Before I get into
12 some of the specifics, I want to give you an opportunity to
13 speak up.

14 We will turn first to the government. Is there
15 anything you want to speak to specifically before we get into
16 some of these motions?

17 MR. TUCKER: No, Your Honor, only to say that we
18 will, as we offered before, work with defense counsel to try
19 to at least provide some points of agreement on proposed
20 voir dire to make the Court's job slightly easier in that
21 respect.

22 Also, the government understands the Court's
23 admonishment about straying into areas that are not
24 appropriate in terms of the activities overseas. Obviously,
25 the government has a case to prove here and that involves

1 criminal actors in the Ukraine and elsewhere, but we have no
2 intention nor does the evidence take us there into other
3 topics that are, to say, politically sensitive but totally
4 irrelevant. So we'll be -- we are already scrutinizing our
5 case and we will be editing where appropriate so we're
6 sensitive to that point as well.

7 THE COURT: One other area before I turn to
8 Mr. Brill and Ms. Whalen and their colleagues.

9 Of course we have the complication of the 4th of
10 July and what to do about it. I can tell the jurors up front
11 what to expect, hopefully, project the length of the trial,
12 give them a realistic sense of how long it will take and also,
13 to the extent I am able to, and I invite your input here, what
14 I am going to do about the 4th of July, other than take it
15 off. The obvious suggestion would be, well, it falls on a
16 Wednesday, the worst possible day for these arrangements, so
17 maybe we take the two days after it off. I am not comfortable
18 with those lengthy breaks. People who have plans for the 4th
19 of July or on holiday for the 4th of July week, we're not
20 going to sit them in any event.

21 So my current thinking, and you needn't respond now
22 but let me know your thoughts, is perhaps we will take the 4th
23 of July off, perhaps what I call a short day which I do sit
24 from time to time which is we work through lunch, we break at
25 about 2:00 and call it a day. Maybe I could do that on

1 Tuesday and start a little later on Thursday. I invite your
2 input. It is something I want to be able to be somewhat more
3 specific with the jurors when it comes time to select them.

4 MR. TUCKER: From the government's perspective, that
5 sounds fine, Judge. Just two sort of data points to provide
6 the Court.

7 Of course much depends on what the defense pursues
8 in terms of a defense strategy and cross-examination, rightly
9 so. The government's efforts to edit its case have led us to
10 conclude about based upon what we know about how Your Honor
11 runs a trial, I think there's a good chance we can be done
12 with our case in chief in less than three weeks and we have
13 three weeks between the commencement of trial and that 4th of
14 July week. So I would propose -- I think it's a good idea to
15 not take jurors who can't do the 4th of July week, I think
16 that that's probably a barrier to entry for them, but -- I
17 guess what I'm getting at is maybe that problem will never
18 really form up because there is a nontrivial chance we could
19 be more or less done before the holiday.

20 THE COURT: Fair enough. And on the other side of
21 that coin, there is a nontrivial chance that we could be in an
22 acute stage of the trial at that point where I am loathe to
23 take other than minimal time off in the middle of summations,
24 let alone deliberations, et cetera, et cetera.

25 I'm going to figure out a way to speak to the jurors

1 that will not commit me to too much of a specific course of
2 action but we have to let them know.

3 Are you suggesting that I still stick to my four to
4 six week estimate in terms of the jurors?

5 MR. TUCKER: Your Honor, the anxiety that the
6 government always has about erring on the side of caution is
7 that it will create the appearance that something went wrong
8 if we're faster than expected. So I think what we would say
9 is around four weeks is what we would predict. That way, if
10 we finish in three, nobody gets the idea that we didn't do
11 something that we had planned on doing.

12 THE COURT: In all my years, I never even thought of
13 that.

14 MR. TUCKER: I'm a worrier, Judge.

15 THE COURT: So am I. I will give it some thought.
16 I will figure out a way to say it. I just do not want to
17 create a false hope in the jurors and then I have disgruntled
18 jurors. That is in nobody's interest to have disgruntled,
19 impatient jurors.

20 MR. TUCKER: Agreed, Your Honor.

21 THE COURT: Mr. Brill, you are chomping at the bit.

22 MR. BRILL: No. Just with respect to scheduling,
23 even if the government's now estimate becomes reality which is
24 a three week area, I mean, my math puts us right at the heels
25 of July 4th and, certainly, as Your Honor can see, just at

1 least with respect to our expert exchanges, potential
2 character evidence, we are going to put on some sort of case,
3 obviously not committing to anything at this point. So I see
4 us going through the holidays is what I'm saying in my best
5 guess. In terms of our case, just to give to the Court and
6 everybody an understanding, you know, we certainly would seek
7 to present our case in a week or less.

8 THE COURT: Okay. You too will edit down as the
9 government claims it is in the process of doing. I am being
10 facetious.

11 Ms. Whalen, anything you want to add on this so far?

12 MS. WHALEN: Your Honor, I can't remember who sent
13 out the ECF bounce about the voir dire requests being due on
14 June 6th. I just wanted to confirm that. If it came from
15 Magistrate Reyes, are you still sticking to that date or do
16 you want us to send general requests earlier than that?

17 THE COURT: No later than the 6th. I am sitting in
18 another court the week before. I will be in touch with
19 chambers but the sooner, the better.

20 MS. WHALEN: I think we'll be able to get them to
21 you sooner rather than later the more difficult questions
22 included in the questionnaire.

23 I do want to apologize. I didn't realize you needed
24 a special panel for the questionnaire so please ignore my
25 lament.

1 THE COURT: Complaints.

2 MS. WHALEN: I would call it a lament, not a
3 complaint.

4 THE COURT: It's all right.

5 MS. WHALEN: And then with respect to jury
6 selection, Your Honor, we had asked for an additional two
7 peremptory challenges. I think that was more because we were
8 concerned about what might come up given the length of the
9 trial and then also just our general concerns about how
10 Russian, how the current news might figure into the jury
11 selection and so that's why we were just asking for one
12 additional peremptory challenge to be exercised independently
13 by each defendant.

14 THE COURT: That I can give you a ruling on today:
15 No. Okay? I do not see the reason for it. I do not see the
16 basis for it. I understand your concerns. I am going to do
17 the best I can to address the process of jury selection and I
18 think, frankly, if I was a little bit -- I will be candid. I
19 understand the position you are in. I was a little bit
20 surprised because, on the one hand, you clearly want to
21 deemphasize certain aspects of the case and yet, on the other
22 hand, those questions did anything but, but I understand you
23 have to have it put to the jury in substance. I understand
24 but we'll have 10 and 6 in the ordinary course.

25 All right. Let me at least frame the discussion for

1 the balance of the afternoon however long it takes: My
2 reaction and to some extent, my rulings, and if I missed any
3 one of these many applications, you will not hesitate to let
4 me know.

5 I will tell you my one area, again, of concern, my
6 one area of real concern here, and I am somewhat dealing in
7 the dark because I have your respective characterizations of
8 expert opinions, but my one area of real concern here is in
9 the quality and the adequacy of the expert submissions. I do
10 not want to be, no judge wants to be in the position in a
11 criminal case, in particular, of precluding evidence. So a
12 word to the wise. Some of these opinions at least as
13 presented or as characterized seem a little white bread to me,
14 general and generic, and do not really address what I think is
15 anticipated clearly in the rule. That is not a ruling because
16 there is a lot for me to cover here and I have not really had
17 a chance to literally digest line for line what it is that is
18 being, that is presented so far in the submissions, but having
19 done it a couple of times, I do have some real concerns.
20 Perhaps I can amplify it as I go on.

21 All right. There is a request for two panels which
22 I have granted and which I have ordered. It will be two
23 dedicated panels solely for our use at least until we
24 discharge any of those jurors.

25 There is a joint motion by both defendants to

1 preclude the government from using certain terms reflected in
2 their indictment. I, frankly, don't find these terms
3 particularly exciting, much less prejudicial. Indeed, one
4 side or the other uses them in the voir dire requests such as
5 "hacking." I mean, that has become pretty much commonplace in
6 our jargon today and I have no doubt ultimately that two hours
7 into this proceeding, we are going to be talking about
8 hacking, targeting victims, targeted attacks, Russian hackers.
9 I mean, they do not concern me and I am not going to direct
10 that they be deleted or expunged from anything.

11 MR. BRILL: Can we jump in? I'm sorry. I didn't
12 mean to interrupt but do you want us to jump in or do you want
13 to just lay out --

14 THE COURT: Go ahead.

15 MR. BRILL: I didn't know how Your Honor wanted to
16 do it.

17 THE COURT: I am here to please.

18 MR. BRILL: I guess just with respect to
19 Your Honor's statement regarding the terms, just pick one of
20 the ones that we did highlight which was "Newswire victims."
21 It seems to me that the word "victim" is a word that's often
22 used in cases even unlike these and I know it seems to me to
23 be fundamental that there's usually an objection to that and I
24 would hope that some courts try to stay away from that only
25 because it's conclusory, basically, and it's also, it's an

1 inflammatory word. You react that way when you hear that
2 someone's a victim.

3 So, I guess really what I'm saying is I'm asking the
4 Court a question which is that is it your ruling that you
5 would permit the government to use that term?

6 THE COURT: Yes, I would, and I do not think this
7 trial is going to be about whether or not we have victims in
8 this case or whether these news services have been victimized.
9 I don't think anybody is going to dispute that. That is not
10 what the case is about.

11 MR. BRILL: Well, we certainly don't dispute that
12 there could have been some intrusion on their computers.

13 THE COURT: That's the word you want admitted.

14 MR. BRILL: But my question is are they going to be
15 called victims by Your Honor and by the government.

16 THE COURT: I am not going to call them anything,
17 but I don't find offensive the use of the word "victim." I
18 think it is an accusation. I don't engage in that language
19 except to the extent if I am reading from the indictment.

20 MR. BRILL: Well, yes, that's part of our objection.

21 THE COURT: Well, I understand your objection and I
22 simply disagree with great respect.

23 There is a motion to preclude this Business Wire
24 business, Business Wire business on the grounds that it does
25 not reflect the specific charge, it is not specifically

1 charged in the substantive counts in the indictment, although
2 it is certainly referenced in the indictment and as far as I
3 can see, part of the conspiracy, certain proof of the
4 existence of the conspiracy. So my inclination there is to
5 deny that application as well.

6 Brady and Giglio. I mean, these cases are
7 unprecedented as far as there has been such an exchange of
8 information. One of the government's letters took me a half a
9 day to read. Do we have any problems with Brady and Giglio?

10 MS. WHALEN: Your Honor, in terms of Giglio, we have
11 an indication that we may have a problem given the
12 government's submission of the 29th requesting that we be
13 precluded from cross-examining Arkadiy Dubovoy, Igor Dubovoy
14 and Leonid Momotok about an action that's pending in Latvia.

15 THE COURT: Latvia, yes.

16 MS. WHALEN: Yes, and while I understand the
17 government's argument that it is not a, I don't know what the
18 equivalent phrase would be, indicted, if it's not an indicted
19 matter.

20 THE COURT: It is an allegation. There has been an
21 allegation.

22 MS. WHALEN: It's a serious allegation, and given
23 the attachments, it's an allegation that's been referred for
24 prosecution. I don't know if the Court has had an opportunity
25 to review the attachment, but it --

1 THE COURT: I looked at it.

2 MS. WHALEN: So it sets forth a serious allegation
3 on the part of Mr. Dubovoy. I didn't see a reference to,
4 rather, a reference to, I'm sorry, Igor Dubovoy as opposed to
5 Arkadiy Dubovoy and Leonid Momotok.

6 I guess our concern is the government is
7 characterizing this as not relevant to the case whereas Leonid
8 Momotok was charged in the underlying indictment, not the
9 superseding indictment, but he was charged in this indictment
10 as being part of a money laundering conspiracy. Both Arkadiy
11 and Igor Dubovoy were charged in the District of New Jersey
12 with an underlying money laundering conspiracy. This act to
13 buy the hotel took place I think it is in 2013 and they
14 allege, I mean their position is, oh, we lost \$100,000, but
15 Your Honor, I think the \$100,000 is probably proceeds from the
16 instant offense which I think makes it relevant to this case.

17 THE COURT: What is your request?

18 MS. WHALEN: Our request is that we should be
19 permitted to cross-examine on this.

20 THE COURT: I was asking about Brady material.

21 MS. WHALEN: In terms of Giglio. I guess what my
22 request is that we see this clearly, as Judge Korman informed
23 me, it's called "Jiglio" material. I started to laugh too and
24 then he stared me down and he said, "I argued that case."

25 THE COURT: Yes.

1 MS. WHALEN: So Giglio material, Your Honor, I think
2 it clearly falls upon within Giglio material and we have
3 secondary concerns about it because the government has
4 received a letter from the government of Latvia. We don't
5 know whether -- and that letter was dated in I believe
6 December of 2017. There were additional documents attached at
7 the end showing that the case had been referred for a
8 prosecution and that letter was dated January 2018.

9 So there could be issues of whether the government
10 has asked the government of Latvia to hold off on an
11 extradition, that they may have asked for other consideration
12 to be shown to Igor, and that would be relevant to us to
13 cross-examine on because that would be evidence of why Igor,
14 Mr. Dubovoy, would have a desire to shade his testimony to
15 help the government. It would be a benefit that was offered
16 to him along with the cooperation agreement and so we think
17 that there needs to be additional disclosure about this
18 specific incident and that we should be allowed to question
19 these witnesses and if there are other, if there's other
20 evidence like this, it should be brought to our attention as a
21 Giglio discussion.

22 THE COURT: Let's keep in mind that we have two
23 issues.

24 On the Giglio side -- that case arose out of the
25 Eastern District of New York. I think I know how to pronounce

1 it notwithstanding Judge Korman's erroneous pronunciation. On
2 the Giglio side, yes, you should have what the government has
3 by all means and, certainly, if the government has intervened
4 on behalf of any witness to a foreign government to withhold
5 extradition or anything of the sort, I hope I do not have to
6 tell these Assistants that has to be disclosed to you.

7 On the issue of whether or not you cross-examine on
8 it, that is one of the issues I was going to get to. It is
9 open in my mind because I am not quite sure I know enough
10 about it right now. Chances are, if you are permitted, you
11 would be bound by the witnesses' answers.

12 MS. WHALEN: Understood.

13 THE COURT: These are after all accusations and that
14 is my view it.

15 MS. WHALEN: Okay. And we would just, because the
16 allegations are manipulations of bank accounts and possible
17 false statements, we think they clearly go to credibility and
18 we would like to cross-examine on them and we understand that
19 we may be stopped by the witness' answer or bound by the
20 witness' answer.

21 THE COURT: You know, I am essentially on your side
22 here, but because they involve bank records, they, therefore,
23 involve credibility? I am not following this.

24 MS. WHALEN: Well, Your Honor, one of the
25 allegations -- I'm sorry. The pages aren't numbered but I'll

1 refer to it.

2 In one of the allegations, Mr. Igor Dubovoy is
3 alleged to have caused money to be transferred from one bank
4 account back to another bank account, both bank accounts under
5 his control, in an effort to show that monies had been paid
6 over to the shareholder or the purported shareholder for this
7 hotel to show that this was an exchange of money or debt or a
8 loan for the shares. I think that given a fraudulent
9 transfer, that clearly goes to credibility and we should be
10 allowed to cross-examine on that.

11 THE COURT: Well, either it is a fraudulent transfer
12 or if the evidence available suggests by inference it may be a
13 fraudulent transfer, I will likely agree with you.

14 MS. WHALEN: And then there's another issue -- we
15 can detail them for the Court, but there's another issue as to
16 Mr. Dubovoy signing a false document about the transfer of
17 shares in this company that --

18 THE COURT: It is a credibility issue obviously.

19 MS. WHALEN: Yes. So I think with respect to this,
20 we can present the Court with a list of the issues that we
21 think are relevant for cross-examination in the specific case
22 but, again, if there's been any kind of assistance in terms of
23 delay of extradition or delay of requiring Mr. Dubovoy to be
24 in court in Latvia, we think we should be told about that so
25 that we can make that argument as well.

1 THE COURT: I agree.

2 MR. BRILL: We join in our co-counsel's argument.

3 THE COURT: Yes. And, of course, the government
4 agrees as well?

5 MR. TUCKER: We also agree there has been no such
6 effort.

7 THE COURT: To your knowledge.

8 MR. TUCKER: To our knowledge.

9 Look, Your Honor's point is well taken. We -- the
10 reason that we're having this argument now is that because the
11 government disclosed this information and made a motion. We
12 understand our Giglio obligation and where it's a close call,
13 we're going to move and where it's not, we'll make
14 disclosures.

15 Just for the record, this particular incident was
16 summarized in reporting that was disclosed to the defense well
17 in advance of the letter that we filed earlier this week. He
18 talked about it in his first proffer. So we understand our
19 obligations. Nobody wants the trial to go slowly. We will
20 continue to make timely disclosures as best we can.

21 THE COURT: All right. Moving right along, the
22 government represents there will be no 404(b). I believe that
23 there is a slight bone of contention, but we will get to it in
24 a different context in a moment.

25 They have no intention of going into Mr. Khalupsky's

1 contesting extradition. So that is out.

2 Venue, you have made your record. It may or may not
3 be a serious issue in the case. I have read the government's
4 response. It is matter of fact, it is ultimately a matter for
5 the jury. I'm not going to dismiss it now on the basis,
6 dismiss those two counts now on that basis.

7 MS. FELDER: Your Honor, if I may?

8 THE COURT: Yes.

9 MS. FELDER: I have asked the government for
10 additional Rule 16 disclosures regarding venue.

11 THE COURT: Regarding?

12 MS. FELDER: Venue. In its last letter, it
13 indicated there is a data center in Brooklyn that was
14 responsible for clearing certain securities transactions.

15 THE COURT: Right.

16 MS. FELDER: I have asked that any additional
17 documents are disclosed, any Rule 16 or other documents in my
18 response to their claim, so we have an opportunity to review
19 that to see if that's actually substantial. Given the nature
20 of that particular company, there are subsidiaries, one
21 located in New York City that is also responsible for clearing
22 securities. So I would like an opportunity to review whatever
23 evidence that they intend to submit as their obligation to
24 disclose under Rule 16.

25 THE COURT: All right.

1 MR. GOPSTEIN: Your Honor, we will provide any
2 additional evidence that we have that we're intending to rely
3 on at trial including relating to this.

4 MS. WHALEN: Also, we haven't come across it in the
5 discovery that has already been provided. So if you have
6 provided it, can you just give us the Bates number? That
7 would be helpful.

8 MR. GOPSTEIN: Sure. For the record, we anticipate
9 additional discovery with respect to venue and it should be
10 coming shortly, but to the extent there's anything else, I'm
11 happy to the point you to it.

12 MS. FELDER: Thank you.

13 MS. WHALEN: Thank you.

14 THE COURT: There is another issue that I think -- I
15 certainly understand what layering is. I'm certainly not
16 ready to rule now whether or not that, the government's
17 proposed evidence concerning the parties' layering their
18 transactions to affect the price, whether or not it comes in
19 certainly suggests something about the relationship of the
20 parties, but I'm not there yet.

21 MR. HEALY: Your Honor, if I might, respectfully,
22 Your Honor said the parties layering their transactions.
23 There's no accusation that anyone engaged in layering. In
24 fact, there's a forwarded e-mail is what it is.

25 THE COURT: I understand. I understand. They're

1 interesting e-mails but I'm not quite there yet.

2 There's an application, I think --

3 MR. TUCKER: I apologize, Your Honor. I don't mean
4 to interrupt. Just on that last point, the way I would see
5 this going then is as we approach the moment when the
6 government would propose to introduce that evidence, we'll
7 raise it the night before so as not to waste the jury's time.

8 Is that how Your Honor wants to proceed?

9 THE COURT: That is the way I like to do it.

10 MR. TUCKER: Sounds good. Thank you, Your Honor.

11 THE COURT: There is an application by Mr. Khalupsky
12 to suppress statements that he made to the government that he
13 was interested in providing certain details.

14 I honestly don't understand the nature of that
15 objection.

16 MS. WHALEN: I guess Your Honor what I'm concerned
17 about is that it's going to lead the government or it's going
18 to lead the jury to speculate about what he would or would not
19 have said. We have no objection to what he said about when in
20 that incident we don't have a problem with this but saying,
21 "Oh, and I can tell you more," and then having no further
22 information, I mean, I think I will honor the Court's
23 admonishment or instruction to the jury that they're only to
24 consider evidence that's actually been presented, but this is
25 the problem with this statement, the statement, "Oh, I can

1 tell you more" and then no evidence of that more being
2 admitted.

3 I think, you know, he might have been able to tell
4 them more but he remained silent. I mean, if he testifies at
5 the trial, clearly, it would be an area for cross-examination,
6 but I'm just not -- I think that it does impinge on his right
7 to remain silent if the government is allowed to present it on
8 their direct case. We have no basis to object to the actual
9 statements of information that he gives. It's just our
10 concern that "I could tell you more," that may have been true
11 and he may have chosen to remain silent and everyone has to
12 respect that right.

13 MR. GOPSTEIN: Your Honor, I think there's no
14 dispute that the statement was lawfully obtained. There's no
15 dispute that it is highly relevant to his knowledge, both of
16 the crimes with which he's charged and his co-conspirators,
17 and there's no dispute that this statement will be offered in
18 a complete fashion. I don't think there is any basis to
19 preclude the statement.

20 THE COURT: I don't think Ms. Whalen is disputing
21 any of that. It is the coda, it is the phrase, "And I can
22 tell you more." Why do you need it?

23 MR. GOPSTEIN: It goes to his knowledge. He has
24 knowledge about this case. He has knowledge about his
25 conspirators.

1 THE COURT: Let me think about that. I may not have
2 focused on that specific aspect, that particular phrase, and I
3 will do just that.

4 Okay. Moving along, Mr. Khalupsky continues to
5 challenge the admissibility of co-conspirator statements. We
6 all know where we come out on that. The government has to
7 satisfy the Geaney standard. They can do it prospectively in
8 the hopes that I agree with them, but I am not going to
9 conduct a hearing in advance of trial or in advance of the
10 testimony of the witnesses. I take the government's
11 representations seriously. I do not want a disruption in the
12 trial.

13 There is another one here.

14 MS. FELDER: Your Honor, if I may, on that issue,
15 the government -- I believe the response focused on whether or
16 not there was a conspiracy. Mr. Khalupsky raised a concern
17 that the statements were not in furtherance of a conspiracy.
18 None of the statements that were highlighted went toward any
19 of the goals or advanced the goals of the conspiracy at all
20 and I think it fails on that part of the test.

21 THE COURT: Well, you know, I do not have the
22 statements themselves specifically but they have to satisfy
23 me, A, there was a conspiracy, B, that the speaker was or
24 acted on behalf of the member of the conspiracy and, C, the
25 statements were, as you said, in furtherance of that

1 conspiracy. You have to satisfy me before I formally admit
2 them into evidence. That's all I can tell you. I agree with
3 you. I agree with what you say. We deal with these all the
4 time in conspiracy cases and the government proceeds at its
5 peril if they tell me subject to connection, that they are
6 going to be able to satisfy, meet the somewhat, somewhat
7 relaxed but nevertheless serious threshold of Geaney. That's
8 my view of it.

9 Mr. Khalupsky asks that the government identify when
10 the exhibits come in, if they pertain to only one defendant
11 and not the other defendant and that I stand up in somewhat
12 ceremonial fashion and announce to the crowded courtroom and
13 the jurors that this only relates to defendant A and not to
14 defendant B.

15 I have two things to say about that. If I were
16 defendant A, I would be upset with that. My second thing is
17 that's your job. On rare occasion, I will grant you, on rare
18 occasion, something comes in, that they will be of such
19 potential significance or prejudice, that it justifies that
20 kind of modest interruption by the court. I don't know that
21 we are going to have such an occasion in this case, I would
22 doubt it, but if it happens, you will make your application.
23 Beyond that, that is all on that.

24 Okay. Expert testimony. It is troubling. I read
25 the rule you all are familiar with. I read the

1 characterizations and the summaries. They do not appear to
2 give enough by way of opinions and methodology, specific
3 opinions. They are not going to discuss the reasonableness of
4 trades and so forth and so on. That is a different matter. I
5 do not know that we will need any expert to opine on the
6 reasonableness of trades and I am not sure it's relevant but I
7 am not making a ruling there. That is an open matter as far
8 as I am concerned.

9 I would urge you, both sides, to go back to your
10 expert disclosures and amplify where you think appropriate
11 because I have a rule to enforce and I will enforce it. I
12 don't want to cut your legs out from under you.

13 MR. BRILL: Judge, if I may on that point, you are
14 being very diplomatic with respect to that. I'm not really
15 sure who, who you're referring to. I'll certainly assume
16 that -- I mean, we're certainly going to take Your Honor's
17 words under advisement and do what you're saying with respect
18 to our exchange, but --

19 THE COURT: Well, Dr. Mayer or Mr. Mayer, he is one
20 such character. They are pretty nondescript. There's no meat
21 to it. There's no specifics. And Katz gives no opinions.

22 I mean, as long as you stick your chin out, I
23 will -- you are not a loan. I don't mean to suggest it is
24 only you.

25 MR. BRILL: Understood. And just with respect, at

1 least with respect to Mr. Mayer who's, who deals with the
2 securities and trading aspect of the case, you know, I think a
3 lot of his work which is, continues to evolve and he continues
4 to consider, has to do with the information that we get from
5 the government and that we give him in order to meet this rule
6 and to provide a sufficient conclusion and opinion.

7 One of our objections is the somewhat moving target
8 of the crux of this case which is the trades that the
9 government claims were illegal or accused or however you want
10 to identify them. It's very hard for anyone, especially an
11 expert, to come to a conclusion when the database -- I say
12 that with a small "D" -- the database keeps changing in terms
13 of, well, now we're going to add ten more accused trades, we
14 might take that one way, we didn't need that one, here's an
15 additional, here's additional trades that we as a government
16 are going to allege are accused. So that has, in significant
17 part, a lot to do with our expert's ability to draw a
18 conclusion because of this, because of this moving target.

19 To be more specific, if we get evidence from the
20 government's expert that draws a conclusion and we get a slide
21 from them which is somewhat of a PowerPoint drawing a
22 conclusion and that slide or that conclusion is based on a
23 subset of stocks or of trades, and then we give that to our
24 expert and our expert looks at that and discusses it, maybe
25 talks about how we can rebut that, you know, advises us and

1 educates us, and then in a month, we get additional slides and
2 maybe even a modification of that slide that we presented to
3 the expert which now changes the subset of stocks and changes,
4 to some extent, the government's expert's opinion, then it's
5 almost impossible and unfair.

6 I mean, really, the ultimate thing here is that it's
7 completely unfair, but it's almost impossible for our expert
8 to be able to have a set target in order to give his proper
9 conclusion.

10 THE COURT: So the monkey's on your back.

11 MS. NESTOR: Sure, Your Honor.

12 The government has provided defense counsel a
13 spreadsheet of all trades that it is considering in this case.
14 The expert's actual exhibits that he's using, to the extent
15 that they've changed over time, have been mostly us taking
16 away an exhibit or providing an extra example from that
17 database that we've provided to defense counsel. They have
18 the information. They requested the information. We provided
19 them the information.

20 So to the extent that they're concerned that we're
21 highlighting certain things for the jury as opposed to other
22 things, that's really the government's prerogative in how to
23 prove their case, but the database itself hasn't changed,
24 Your Honor.

25 THE COURT: Well, is the body of information that

1 the expert has available to him, in your perspective, is that
2 changing?

3 MS. NESTOR: No.

4 MR. BRILL: Okay. All right then.

5 THE COURT: Well, somebody asked for a final list of
6 trades.

7 MR. BRILL: Well, you know what, Judge, I
8 respectfully disagree with what the government is saying. We
9 tried to present the court with a chronology here that early
10 on, last year, February and specifically of 2017, we asked for
11 this very question, a list of the accused trades because as I
12 presented to the court, it's, it is the crux of the case.

13 You know, we are being charged with insider trading
14 or trading on nonpublic information. Certainly we must have
15 the trades that make up that crime allegedly. So we asked for
16 that. We did receive a spreadsheet which included
17 approximately 750 trades, approximately, and to be frank, we
18 were told that that is the universe, that is the universe of
19 accused trades. Frankly, we have, subsequent to that, have
20 received additional exchanges where, you know, some have been
21 added to that, some have been taken away, some were never
22 included in that original spreadsheet but now are and so I
23 don't -- I'm not sure what the government --

24 THE COURT: Excuse me. When you say "some," you
25 mean some trades?

1 MR. BRILL: Yes. Some trades that were not a part
2 of that original spreadsheet that we were told were the
3 accused trades. Now, as we stand here today, we're dealing
4 with other allegedly accused trades that were not part of that
5 original exchange back in February of 2017.

6 THE COURT: You know what really confounds me here?
7 I don't know if the word is "unprecedented." There was a
8 considerable exchange of information early on which you
9 certainly didn't object to understandably. The government has
10 an ongoing obligation to update the information. You
11 certainly don't have any quarrel with that. To the extent
12 that it has disabled your expert because the body of
13 information has changed in a material way, assuming that has
14 happened, I understand what you are saying.

15 Somebody has asked for the final list of trades. Do
16 we have the final list of trades?

17 MR. TUCKER: Yes, Your Honor. It was among the
18 exhibits disclosed on May 11th.

19 THE COURT: There is your final list of trades.

20 MR. HEALY: If I might, Your Honor, and I think that
21 people aren't saying things that are exactly in opposition but
22 I think that there's a point that's missed. The government
23 did give us a spreadsheet that had every trade that
24 Mr. Korchevsky made, not even just during the course of the
25 conspiracy, but going back even a year or so before that. It

1 is well over a thousand, many over a thousand.

2 The expert has given us slides that focus in on
3 January '11 to May of '15 and in that, there's a number, there
4 are often, 592 trades, 670. A slide will say -- and those are
5 the numbers that are change changing, 670 short-term
6 round-trip trades.

7 What we are asking for, frankly, again there's 600,
8 don't hold me to it, what are those out of the thousand or
9 more trades that you've told us exist which we know exist,
10 which 670 are you referring to and there's two reasons we're
11 asking. One is so we can give a more precise disclosure to
12 our expert because once he knows, okay, this is what their
13 expert is saying are these 600 trades, he can do that and,
14 secondly, Mr. Korchevsky has a right to know what he's accused
15 of. Yes, they gave us on May 11th a huge spreadsheet but
16 they're not accusing all of those trades.

17 THE COURT: So I see you shaking your head yes and
18 shaking your head no.

19 MR. TUCKER: So that we're all operating from the
20 same body of vocabulary, I want to sort of lay out a few key
21 points.

22 Our expert, Dr. Canjels produced what we call a
23 deck. It's a PowerPoint presentation. We provided the first
24 version of that deck to defense counsel last summer which is
25 well in advance of trial with the idea that we can help

1 counsel focus on the body of trades that was relevant. Each
2 slide of the deck includes a footnote which defines the
3 relevant universe that would allow someone to work with the
4 spreadsheets to reproduce the numbers.

5 Rather than wasting the Court's time, I would
6 propose that we work with counsel. We can explain to them
7 perhaps more precisely how to use the data we provided so they
8 can back into some of the decks. But the point here at the
9 end of the day, right, Judge is that there is an enormous,
10 an enormous body of trades that the government will take the
11 position at trial are suspicious and have indicia to suggest
12 they're based on the stolen press releases.

13 MR. BRILL: I'm sorry. So if that is the adjective
14 "enormous," then how --

15 MR. TUCKER: I wasn't done.

16 MR. BRILL: -- do I go to my expert and say
17 here's -- there's going to be an enormous amount of illegal
18 trades that look suspicious. Give me your expert opinion on
19 why they're not suspicious.

20 THE COURT: The case is about trades made in a
21 specific, fairly confined period of time relative to a certain
22 release of public information. Why is it so difficult then to
23 focus it in on those trades?

24 MR. BRILL: Well, for one is, Your Honor, that are
25 we to assume that every trade that is made within that

1 particular period of time is a suspicious trade? I mean, is
2 that what the government is saying?

3 THE COURT: I assume that question was asked a long
4 time ago.

5 MR. BRILL: I mean, it may have been. I didn't
6 know -- I didn't think the answer is yes.

7 THE COURT: I think the answer is no.

8 MR. TUCKER: You are correct, Your Honor.
9 Your Honor did this a few years ago when we were first before
10 you.

11 The point is simply this. Trades that were made
12 during a particular period of time between 2010 and 2015 where
13 the initial position was taken by the defendant and his
14 co-conspirators during the period between press release upload
15 and press release distribution, that is the universe we're
16 talking about. We slice and dice it and focus on particular
17 trades mostly to aid the jury, but that's the universe and
18 that's not difficult to get to with the data we provided.

19 And just to put a fine point on it, Judge, what we
20 have provided defense counsel with, because in order to run
21 that analysis, you need the upload data from the press
22 release -- sorry, from the Newswire companies and you need the
23 trading data from the different defendants and their
24 co-conspirators and all of that came from different databases.

25 THE COURT: Good.

1 MR. TUCKER: So what the government did, working
2 with other regulatory authorities, was create a single
3 database where all of that information was put together in a
4 readily modifiable and manipulatable format and that
5 information was provided to the defense and early iterations
6 and final version of that document was disclosed on May 11th.

7 MS. NESTOR: In addition to that, Your Honor, all
8 the underlying trades are also available to defense and were
9 disclosed as an exhibit on May 11th so they have all the
10 information that they need.

11 MR. BRILL: Your Honor, what we're left with then
12 is -- essentially what the government has disclosed to us is
13 we're not going to tell you what the specific trades are.
14 We're going to tell you -- I mean, I guess I'm just trying to
15 make clear as to what they're saying.

16 Are they saying that all of the trades that were
17 done within 2010 and 2015, during the time of what they call
18 the window which is the upload time and submission of that
19 press release time, is the government saying that their
20 position is that those are all suspicious trades?

21 THE COURT: I cannot believe I am being asked this
22 question, A, and I can't believe I'm being asked this question
23 today. The answer to the question is?

24 MR. TUCKER: Suspicious? Yes.

25 MR. BRILL: Well, come on. Your Honor, I mean, are

1 they accused -- are those trades going to be, in the
2 government's case, the ones that they accuse Mr. Korchevsky
3 trading on nonpublic information? I mean, that's the charge.

4 THE COURT: Not an unreasonable question.

5 MR. TUCKER: Well, Judge, just two points.

6 THE COURT: You don't convict on smoke. I don't
7 have to tell that you.

8 MR. TUCKER: Absolutely not, Judge, and that's
9 really the problem. That's the nub here. Right? The first
10 is the defendant is charged not only with substantive
11 securities fraud but multiple conspiracies. So we wouldn't
12 actually need to flag a single trade in order to convict him
13 of those crimes. That said, we have identified numerous
14 trades, many trades, because the defendant was a prolific
15 trader, that have those indicia of suspiciousness. The
16 government has other evidence bearing on particularized trades
17 in that body, in that universe. So the government will take
18 the position that those trades are suspicious and we will
19 highlight specific trades from that body with additional
20 evidence.

21 THE COURT: To prove that those specific trades
22 were, in fact --

23 MR. TUCKER: Correct, Your Honor.

24 THE COURT: -- the execution of the conspiracy?

25 MR. TUCKER: Yes, Your Honor.

1 THE COURT: And have you identified those trades?

2 MR. TUCKER: Your Honor, they can be identified
3 using the spreadsheet. The defendant was a prolific trader.
4 He traded an enormous amount.

5 THE COURT: I understand.

6 MR. TUCKER: So in view of the fact that a lot of
7 the trades he made were criminal trades doesn't place an
8 additional burden on the government. The spreadsheet is very
9 simple to use. If you filter based on trades made in the
10 window during this period, you'll get your list. It's one
11 click, Judge.

12 THE COURT: Trades in the window. So the trades in
13 the window --

14 MR. TUCKER: During the time frame.

15 THE COURT: -- are the trades that you are going to
16 prove?

17 MR. TUCKER: We will allege, Your Honor.

18 MR. HEALY: Your Honor, if I might.

19 THE COURT: You have alleged. You will try to
20 prove. Go ahead.

21 MR. HEALY: They've talked about the deck that their
22 expert, the spreadsheet that their experts provided. There
23 have been, I think, three different iterations on it and
24 that's not objectionable in and of itself, but the
25 footnotes -- and I was once told by a learned judge always

1 know that the bad stuff are in the footnotes -- the footnotes
2 changed.

3 So, for example, one slide might say the universe
4 here is not just in the window and not just a three-day
5 turnaround time, but now it has to be on the same day the
6 trade was made, on the same day as the upload because
7 sometimes the uploads are outside the same day. Some of the
8 trades were made on earnings reports in the footnote. You
9 haven't heard a thing about that in the government's
10 representation that all in-the-window trades are now going to
11 be accused or allegedly suspicious trades.

12 This whole conversation started with why hasn't the
13 expert, your expert given more meat to his opinion because
14 he's calling and saying, hey, I just noticed, for example, in
15 2015, they gave us a spreadsheet in February that the
16 government put ID numbers on the trade, 633, some of those
17 trades were in two different accounts so they occupy one ID
18 number. In 2015, there was a subset of numbers that has now
19 increased. Now, they've had this information all along. The
20 indicia, whatever their expert has been using, suddenly has
21 included trades that weren't included earlier. So our expert
22 is, like, well, I guess I have to rethink what I was thinking
23 they were thinking in advising you and that's not fair.

24 THE COURT: You have a list of trades that you are
25 going to prove are criminal.

1 MR. TUCKER: Yes, Your Honor. We will help defense
2 counsel.

3 THE COURT: I do not want this to linger. I want to
4 you get together. Today is Thursday. I want to hear from you
5 by Monday because part of this discussion sounds like ships
6 passing in the night and then part of it is a little troubling
7 to me. If you have specific trades that you are going to
8 attempt to prove were illegal, not suspicious, but
9 manifestation of the conspiracy itself, give them a list of
10 those trades and let's have it done with.

11 MR. BRILL: I appreciate what Your Honor is saying
12 and I don't want to belabor it either but I just need to,
13 because I hear what Your Honor is saying and I think there are
14 two categories here. There are the wide universe of what the
15 government calls suspicious trades, but then there are the
16 subset of that --

17 THE COURT: I am talking about the subset.

18 MR. BRILL: Okay. That's why I wanted to make that
19 clear. So Your Honor is asking that the government provide
20 the subset that they're going to --

21 THE COURT: Illegal trades, not suspicious trades.
22 The illegal trades. All right?

23 MR. BRILL: Yes.

24 THE COURT: And if there are any rough spots, I am
25 available. I won't be in the building but I will be

1 available, we can talk, but I need you to get on this because
2 I cannot be taking shots at his experts if the information is
3 in any way, whether it is materially changing or not. If it
4 is changing, I cannot study the expert opinion to decide
5 whether or not it satisfies the rule unless this is put to
6 bed. Okay?

7 MR. TUCKER: I hear everything Your Honor is saying.
8 This is putting the government in a little bit of an unusual
9 spot here and I just want to set something out.

10 The universe of suspicious trades is the universe
11 that I described. We are, I hope everyone feels relieved, to
12 know not going to walk through the literally hundreds of
13 examples with the jury. We're going to talk --

14 THE COURT: I am not relieved. We were not going to
15 do that in any event.

16 MR. TUCKER: So there is a universe of trades that
17 are potentially criminal trades. The statistical analysis
18 that the government's expert runs shows that there is not an
19 innocent explanation for that universe of potentially
20 suspicious trades. Then there are subsets of those trades
21 that the government has other evidence pertaining to.

22 THE COURT: Okay.

23 MR. TUCKER: What the government will provide
24 defense counsel with which it has already provided for the
25 record is the list of that larger universe which, again, are

1 the trades that were made during the period of conspiracy
2 where the positions were taken inside the window. The
3 government will not take the position at trial that it has
4 other extrinsic evidence that each and every one of those
5 thousands of trades was, in fact, based on material nonpublic
6 information, however, the trades taken together statistically
7 are significant and that's what's important.

8 So, I'm happy to help defense counsel through this,
9 but a bit of a straw man argument is being advanced here. The
10 government is not under an obligation to prove that each and
11 every one of the trades that were made in the window were, in
12 fact, based on material nonpublic information in order to
13 prove the charges in this case --

14 THE COURT: Agreed.

15 MR. TUCKER: -- and Your Honor knows that.

16 THE COURT: Agreed.

17 MR. BRILL: But, Your Honor --

18 THE COURT: Relax.

19 We have to take it a step further. You can prove it
20 circumstantially. You can satisfy the fact finder that all of
21 these trades in the window are not only suspicious but were so
22 suspicious, that they were likely the product of the criminal
23 conspiracy. You can do that circumstantially, whether the
24 jury finds it or not, but you told me beyond that you had
25 specific identifiable trades that you are going to prove with

1 other evidence that indeed were the illegal trades. Did I --

2 MR. TUCKER: So Your Honor is asking us to flag for
3 counsel the other trades for which we have other evidence in a
4 way beyond having disclosed our trial exhibits.

5 THE COURT: He's accused of it. Let's do it. They
6 have the window of trades. If they don't have the window of
7 trades, they haven't been paying attention, and I know they
8 have been paying attention. It is, for lack of a better word,
9 a subset within the subset. I want you to identify that to
10 the defendants.

11 You know what they are. Why the sigh?

12 MR. TUCKER: Your Honor, the government went above
13 and beyond here and made disclosures.

14 THE COURT: I have no quarrel with that.

15 MR. TUCKER: And it's just an enormous burden and
16 totally prejudicial and unfair to the government to require us
17 to try our case for counsel a week before we begin. If that's
18 Your Honor's ruling, we, of course, respect it, but that's not
19 required and not appropriate and it binds the government's
20 hands in a way that's not fair.

21 THE COURT: But you've accused him of making illegal
22 trades. At a minimum, he should know what trades are you
23 accusing him of making that are the product of nonpublic
24 material information. What am I missing?

25 MR. TUCKER: I understand Your Honor's ruling.

1 THE COURT: I have already talked about briefly
2 about this whole business of good conduct. Mr. Korchevsky's
3 work will be limited. It will be a very short tether. I'm
4 not ruling on it, but be aware.

5 There was a question about authentication that
6 Mr. Brill has raised so persistently. Obviously, the
7 government is going to have to authenticate these documents
8 before they come into evidence.

9 MR. HEALY: Is Your Honor talking about the press
10 releases that we've called the 2018 press releases?

11 THE COURT: Right.

12 MR. HEALY: It's a twofold argument, Your Honor.
13 One is authentication.

14 THE COURT: I understand your argument. I have read
15 the papers. All right. Go ahead.

16 MR. HEALY: Our argument is, one hand, they can
17 authenticate that somebody did download them in 2013 perhaps,
18 but the second part of the argument is what is the relevance
19 of a document that is, A, clearly not necessarily the same
20 thing, in other words, a paralegal can say, Yes, I downloaded
21 that from Google last week, what knowledge does he have that
22 that's exactly the same press release that was distributed
23 and, secondly, what's the relevance of that? Because once
24 it's public knowledge, it has nothing to do with material
25 nonpublic information. Once it's public knowledge, it's

1 irrelevant, and especially when a lot of these press
2 releases --

3 THE COURT: I do not follow the last comment. Once
4 it is public knowledge, I don't know if it is irrelevant, but
5 it is not terribly germane to the issue of proof, but there
6 was a time when it was not public knowledge.

7 MR. HEALY: Not necessarily what that paralegal
8 downloaded a month ago. The assumption is, well, since we
9 were able to get it in April of 2018, it must have been on a
10 computer server exactly as it is.

11 THE COURT: I understand your point and I am simply
12 repeating it. The government has got to be able to satisfy me
13 that what they downloaded in 2018 appeared on that computer
14 back then.

15 MR. HEALY: That was our argument, Your Honor.
16 Thank you.

17 THE COURT: I do not disagree with that.

18 MR. TUCKER: Sorry, Your Honor. So Your Honor's
19 point is that we have to be able to establish that the press
20 release as downloaded in 2018 is sufficiently identical, if
21 not identical to the distributed press release. That's
22 Your Honor's point, right?

23 THE COURT: That's right.

24 MR. TUCKER: To the extent defense counsel wants to
25 argue that there's some material difference between the press

1 releases uploaded and the press releases distributed, they'll
2 be free to do that. The government will, when possible,
3 provide uploaded press releases including the large body of
4 them that were in the e-mail account that Mr. Korchevsky
5 received the stolen press releases from, but not for the
6 purposes of every trade that we're alleging here introduce
7 into evidence the uploaded version of the press release.
8 Defense counsel can make the argument but that's the
9 government's proof.

10 MS. NESTOR: Your Honor, this goes to the weight of
11 the evidence, not to the evidence itself. They can argue this
12 to the jury.

13 THE COURT: As long as I am reasonably confident
14 that what purports to be a copy of what was indeed in
15 existence back when and it is the operative document on which
16 the defendants are alleged to have traded -- you shake your
17 head no. Am I wrong?

18 MS. NESTOR: Your Honor, I understand your point. I
19 think that our point is that we are not going to present to
20 the jury every single press release as it was uploaded to the
21 Newswire. We're going to present the final press releases.
22 Then the jury, based on the defense's arguments, can decide
23 whether those press releases changed. We will have testimony
24 about that for the jury.

25 THE COURT: I do not really see a problem but when

1 the time comes, you will alert me if I am wrong.

2 Mr. Korchevsky's employment records, if he
3 testifies, it's a different story. If the door is opened in
4 some other fashion, it may be a different story, but standing
5 alone, I don't see any real use for it.

6 MR. BRILL: Your Honor, I'm sorry. You mean if he
7 testifies, it's a different story, is that, that simply the
8 idea of testifying opens --

9 THE COURT: No. No.

10 MR. BRILL: I'm just trying to clarify.

11 THE COURT: I am not going to clarify. That is the
12 whole point. If he testifies, it may very well may be
13 relevant and may be germane. I don't know the specifics of
14 the records. I know he had some ups and downs as a trader.
15 If he gets on the witness stand and talks about his great
16 prowess as a trader, he is going to open himself up to being
17 cross-examined on his history with Morgan Stanley, for
18 example.

19 It is hard for me in the abstract right here and now
20 to give you every conceivable possibility that may come up.
21 I'm telling you that I agree with you but, as a general
22 matter, I am not going to let the government just simply
23 affirmatively prove that he had an up and down history as a
24 trader. If it becomes germane to either issues of credibility
25 or in some other fashion, then we'll have to revisit it but

1 that's my general sense of it now. Okay?

2 MR. BRILL: Yes, I understand you. I do. That
3 issue though ties in -- I don't know if you already addressed
4 this -- it ties into, and you may have alluded to this, the
5 404(b) evidence that we weren't really given as 404(b) which
6 is motive. I don't know.

7 THE COURT: I do not see this ties into motive.

8 MR. BRILL: I don't either, but I think the
9 government is in some way extrapolating that after 2008, there
10 was this level of desperation but to me, it's extremely
11 contrived and I have no clue where that comes from other than
12 a creative speculative universe.

13 THE COURT: There is a lot of creating of the
14 universe going on about here.

15 MR. BRILL: I don't mean to make light of it. I
16 guess what I'm saying --

17 THE COURT: Here is what I am saying. Quite while
18 you are ahead.

19 MR. BRILL: Okay. I will.

20 THE COURT: Is it "Canjels" or "Canjeels"?

21 MS. NESTOR: Canjels.

22 THE COURT: What I understand about his proposed
23 testimony, I applaud it. It's essentially a tutorial.

24 MR. BRILL: No one is disputing that he shouldn't
25 come and give a tutorial. The question is does he give a

1 tutorial -- well, I think do you mean Canjels or Carocci? You
2 might mean Carocci. Canjels is more of the statistician.
3 Carocci is more of the background.

4 THE COURT: I think you are right. I think I mean
5 Carocci.

6 MR. TUCKER: You mean Carocci, Your Honor.

7 MR. BRILL: That's fine. Nor do we feel that's
8 inappropriate. What we felt was inappropriate was Your Honor
9 deem him an expert before he does that.

10 THE COURT: I do not use the term "expert" anyway.
11 If he is going to express opinions, I will call him an opinion
12 witness. If he is not going to express opinions, he will be
13 treated like any other fact witness.

14 MR. BRILL: Okay.

15 MR. GOPSTEIN: Your Honor, we will take in your
16 guidance as well. We're also going to supplement his expert
17 disclosures specifically, but he's testified numerous times on
18 these topics as an expert and we'll be supplementing his
19 opinions in addition to the explanations that he is going to
20 be giving. So we will move, based on that disclosure, to
21 qualify him as an expert in the fields that we designate.

22 THE COURT: Okay.

23 What else?

24 MR. TUCKER: Your Honor, may I have one moment to
25 confer with my colleagues?

1 THE COURT: Sure. Take your time.

2 (Pause.)

3 THE COURT: Yes?

4 MR. TUCKER: So Your Honor, mindful of the Court's
5 strong preference to sort these things out before trial, I
6 want to be clear what the government's, for lack of a better
7 word, homework is here on the trades.

8 The government will happily identify for defense
9 counsel the particular trades we're going to highlight and the
10 corresponding exhibits so that will include e-mails that bear
11 on particular days of trading and I guess we'll identify
12 particular press releases in the overseas e-mail accounts.

13 I just want to make one point clear for the Court
14 and make certain that this is not going to trip us up
15 mid-trial. Much of what we deem our critical evidence coming
16 from the economist, Dr. Canjels, stems from his statistical
17 analysis of suspicious trades, those trades identified as
18 suspicious in the way that I explained a moment ago,
19 in-the-window trades.

20 I want to make certain that I understand the
21 confines of the Court's ruling that the government is not
22 going to be precluded from contending that those trades are
23 criminal as well even though we might not have an e-mail from
24 Mr. Korchevsky talking about a particular trade or mentioning
25 it in a particular chat.

1 I see Your Honor is shaking your head.

2 THE COURT: I made no such comment.

3 MR. TUCKER: Okay. So all we're being asked to do
4 here is basically is help counsel match up exhibits with
5 trades we're going to spend extra time on at trial.

6 THE COURT: Trades for which you have evidence
7 beyond the circumstantial evidence of these window trades that
8 will suggest that he, they are illegal trades.

9 MR. BRILL: May I have just a moment, Your Honor?

10 THE COURT: Take your time.

11 (Pause.)

12 MR. TUCKER: Your Honor, could we get those to
13 defense counsel by Monday? It will take some time to pull it
14 together in that way.

15 THE COURT: Yes.

16 MS. NESTOR: And, Your Honor, just to be clear, they
17 have those exhibits in their possession.

18 THE COURT: I totally understand what you are
19 saying. I know they are not helpless. I have to run a trial.

20 MS. NESTOR: We understand, Your Honor.

21 (Pause.)

22 MR. HEALY: Your Honor, I just wanted to clarify.
23 We appreciate the government's willingness to try to hone in
24 on this issue. One thing that is concerning to us, I
25 appreciate the idea that they're going to identify the trades

1 that are going to be proved up with other extrinsic evidence,
2 but this idea that there's this universe of suspicious trades,
3 the government, for example, said from 2010 to 2015
4 in-the-window trades. That's not the universe of Dr. Canjels,
5 at least in everything that we've been given to date and there
6 are 47 different 3500 pieces. He's always starting in January
7 of '11. Now, the question is should Mr. Korchevsky then say
8 which is the universe. Is it '10 to '15 or is it '11 to '15?

9 Again, those footnotes. If Dr. Canjels identifies,
10 and there are footnotes, a specific criteria and those are
11 what he's basing his statistical analysis on, will the
12 government then be bound by that or will they say, oh, well,
13 but there's many more suspicious trades that we are alleging
14 are the product of material nonpublic information.

15 MR. TUCKER: Just a helpful point on that, Judge.
16 So the way that Dr. Canjels' deck works is he slices and dices
17 the data in a variety of different ways to test and illustrate
18 certain theories based on the data. So he does pare down and
19 ramp up the universe, slide by slide, always operating from
20 that central premise that the suspicious trades are
21 in-the-window trades.

22 So, for instance, he has, he has a slide where he
23 shows if you were to just look at trades that happened between
24 9:30 and 4:00 p.m. where the press releases were uploaded on
25 that same day, it is statistically virtually impossible that

1 the trading pattern is innocent. It is certainly not the
2 government's contention that that is the limit or that is the
3 complete universe of suspicious trades. It is a subset of the
4 suspicious universe to illustrate a particular point.

5 THE COURT: I understand that. Let's be clear.
6 These experts, both sides have made this point, I am going to
7 hold these experts to a very short tether when it comes to
8 opinions expressed with ultimate facts that are the province
9 of the jury.

10 MS. WHALEN: Yes. My understanding from reading
11 your reports that are relevant to our case is the use is I
12 think the appropriate word is "random" as opposed to
13 "innocent" and we would object to the use of the word
14 "innocent." I think that the expert can talk about what's
15 random, what's not random but, again, I don't think he should
16 be permitted to talk about what's innocent and what's not
17 innocent.

18 MS. NESTOR: Your Honor, that's not going to happen
19 in this case.

20 MS. WHALEN: Okay.

21 THE COURT: That's apropos what I just said.

22 MS. WHALEN: Thank you.

23 THE COURT: Well, I hope we have made some progress.
24 I will hear from you sometime Monday or Tuesday at the latest.

25 MR. TUCKER: Yes, Your Honor.

1 THE COURT: If there is a lingering issue, I will
2 conference you in where I am and we will talk it out some
3 more. I will probably have some more information for you on
4 the logistics of selection. Ellie is already giving me some
5 information.

6 I am told that I guess I should formally grant the
7 motion by each defendant to join in the motions of the
8 co-defendant which, of course, I do.

9 We will probably have some more information
10 vis-a-vis logistics of the trial and jury selection and so
11 forth sometime next week for you. In the interim, if you need
12 to get ahold of me separate and apart from these issues or
13 because of these issues, please do not hesitate and get ahold
14 of Ellie and she'll get a hold of me.

15 Thank for your time, folks.

16 MR. TUCKER: Thank you, Your Honor.

17 MR. BRILL: Thank you, Your Honor.

18 MS. WHALEN: Thank you, Your Honor.

19 (Matter concluded.)

21 * * * * *

22 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

24 / s/ Charleane M. Heading

June 1, 2018

25 CHARLEANE M. HEADING

DATE